FILED

NOT FOR PUBLICATION

JAN 19 2006

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 05-30000
Plaintiff - Appellee,	D.C. No. CR-04-02054-LRS
v.	
JOSE GUADALUPE FABIAN-CHAVEZ, aka Jose Guadalupe Chavez-Fabian,	MEMORANDUM[*]
Defendant - Appellant.	

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Submitted January 9, 2006[**]

Before: HUG, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

Jose Guadalupe Fabian-Chavez appeals from the 46-month sentence

imposed following his guilty plea conviction for being an alien in the United States

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[*]   This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

[**]   This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

after deportation in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291.

Fabian-Chavez contends that the district court erred by granting only a five-level downward departure and denying his request for additional downward departures. Fabian-Chavez was sentenced before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). Although a defendant may not challenge on appeal the extent of a downward departure under the pre-*Booker* mandatory Sentencing Guidelines, *see United States v. Riggins*, 40 F.3d 1055, 1058 (9th Cir. 1994), we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory. Accordingly, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional *Booker* error).

REMANDED.